

- **When an officer applies for pre-retirement leave it is most unacceptable to initiate action to dismiss him.**
- **The harshest punishment cannot be chosen for a minor offence the more so if Appellant was injured at work**

The Appellant is appealing against the decision of the Respondent to dismiss him from duty on the ground of conviction for possession of cannabis which occurred in....

Appellant's Case

Appellant, who was a HDWSP at the District Council of ..., averred that he took employment with ...District Council (hereafter referred to as the D.C.) since ... as REMDR and had an unblemished record at work. He also averred that he was injured at work and had a permanent incapacity of 30%. He recognised that he was arrested for possession of Cannabis in ... and pleaded guilty to the charge on the He paid a fine of Rs 1500 + Rs 100 as costs. He stated in Examination in Chief that he believed that he had been framed by his friend and even averred that he does not even smoke.... But he was suffering so much that he let himself be convinced to try ... as a remedy. He insisted during cross examination that as averred in his statement of case he informed his superior of the arrest and he resumed work after being bailed out. Since then he had never been convicted for any criminal offence.

The grounds of appeal of the Appellant are:

"That the decision is ultravires, unfair breaches Appellant's right to legitimate expectation and is further discriminatory and an abuse of the process of disciplinary procedure after unexplained inordinate delay." (SIC)

He also stated that *"Appellant took up the post of BWO for some ... years and in ... he was seriously injured in the course of his employment which necessitated admission to ... Hospital for over a month"*.

He averred that he was on injury leave for almost ... months and that on resumption of duty, he was granted a light job. He applied for pre mature retirement on medical ground. Leave prior to retirement was granted but he was recalled from his vacation leave to face disciplinary proceedings which spanned from ... up to.... He stated that the DC recommended a less severe punishment than dismissal in view of several mitigating circumstances.

But Respondent caused the dismissal letter to be issued by the D.C. on ... **based solely on the aforesaid conviction.** His application for review to Respondent on grounds stated in his letter was turned down.

Appellant requested that the said decision be quashed "*as the said decision is ultra vires sections 31 & 37 of the Local Government Service Regulations 1984 (GN 30/1984) arbitrary, unfair, unreasonable, irrational* breaching the Appellant's right to legitimate expectations that he be kept in employment until his ordinary retirement and it further failed to consider material facts admitted by his employer, and consider other forms of "**punishments**" pursuant to Section 41 which were reportedly suggested by the D.C".

The Appellant also averred that there had been "**a substantial procedural flaw in the disciplinary process** in view of the inactions and or failures of the D.C. to take timely action following the arrest of Appellant in **2012 for "Possession of Cannabis"**. He added that "*as he had been kept in continuous employment for almost four years and not interdicted following his provisional charge or his conviction in ... created a legitimate expectation that he would not face the ultimate sanction.*

Appellant was assisted by his Industrial Consultant at the Disciplinary Hearing who submitted that proceedings should be stayed because of inordinate delay and that the case should have been dealt with in a compassionate way.

He further claimed to have been discriminatorily treated by raising several issues namely that several officers who were convicted by a Court had not been dismissed from the local government service. He further averred that Respondent's decision to dismiss him from employment breached the unfairness claimed by him

who devoted a large part of his life in the employment of the D.C., the more so as he was injured at work with a permanent degree of incapacity. He prayed that the decision of the Respondent be quashed by the Tribunal.

Respondent's Case

Respondent was represented by its Secretary who solemnly affirmed that Respondent's Statement of Defence was true and correct. He confirmed that Appellant was injured by a lorry basket whilst on duty. Respondent averred in its statement of defence that Appellant was on injury leave from ... to The Appellant had submitted a letter dated ... stating that he had a permanent incapacity of 30% but the insurance company offered him 15% Permanent Partial Disablement. Respondent also confirmed that Appellant had an unblemished record concerning his work. Respondent averred in its Statement of Defence that it was only on the ... that Appellant informed the Respondent of his conviction. This happened after the survey carried out by the Council concerning all its employees. He stated that the Appellant did not apply for pre-mature retirement on medical ground but instead "*he applied for the grant of compensation on ground of physical incapacity*" and sent a medical certificate on ... requesting for light duty.

Later he submitted a request to be retired from the service on ground of age by letter dated.... This letter was addressed to the Responsible Officer of the District Council of ... and according to the latter, the request of the Appellant was sent to the Ministry on... In the meantime, Appellant applied for vacation leave which was granted. Respondent however averred that a reply was obtained on ... informing Respondent that in view of the fact that Appellant had been convicted in a drug related offence, action should, in the first instance be initiated as per provisions of Regulation 36 of the Local Government Service Commission (LGSC) Regulations 1984. Thereafter, his request for retirement on ground of age could be entertained. On ... he made a request to resume duty which was accepted.

Upon a question coming from the Tribunal, the representative of the Respondent declared that the Respondent was not aware at the appropriate time of the Appellant's request for pre-retirement on ground of age. He even went further to

say that had this request been sent to the Respondent, it could have been considered.

During cross examination Respondent's Representative stated four reasons which motivated the Commission to dismiss Appellant. Because of (i) government's policy to "*combattre la drogue ...*" (ii) the impact of the offence on himself, his family and society in general (iii) to preserve the integrity of the service (iv) so that it acts as a deterrent for other employees. However he could not reply on why the ... Court did not judge this case with such severity. He also admitted that while Appellant stayed at the District Council until his dismissal, he did not cause any problem in his place of work.

Respondent's representative finally admitted that the file of Appellant may have been wrongly processed regarding his application for retirement and the fact that he was injured at work and was a "victim".

Respondent moved that the Appeal be set aside.

The representative of the District Council was called to depone. She was shown the letter dated ... emanating from the D.C. with regards to the Appellant's request for pre-retirement on ground of age wherein he referred to the conviction of Appellant. She confirmed that she was aware of the content of the letter. She further added that the Appellant had a good record at work and that the Responsible Officer had recommended a suspension of 10 days.

However she was unable to depone concerning the fact that Appellant had stated that he had informed the Chief Executive in ... that he had been convicted. She only joined the District Council in ... and had no knowledge of same.

Determination

This is a case where the decision of the Respondent to dismiss the Appellant, is seriously put into question. It is a fact that the punishment inflicted to Appellant is very harsh in as much as the Appellant has been deprived of his lump sum and a retirement pension after his unblemished record of ... years of service with the Local

Authority and though he had been injured at work. The Representative of the Respondent admitted that the Respondent may have overlooked this.

It must be remembered that the Appellant was called for a Hearing under Regulation 36 of the LGSC Regulation. The question is, was the offence committed by him such as to be considered as "*a minor offence not entailing fraud or dishonesty and not related to an officer's employment*"

The Tribunal has expressed its views on the issue of drug addiction and the possession of cannabis in a previous Determination with regard to the application of Regulation 36. It cited the Supreme Court in the case of the judicial review of LGSC v/s PBAT ipo R Boodhun (2016 SCJ 511) which quoted the Dangerous Drug Act to say that while smoking cannabis may be a minor offence "*the same cannot be said for a drug-dealing offence, which includes the offence of cultivation of cannabis*". The offence committed by the Appellant is one of possession of cannabis and is serious but does it deserve the harsh punishment imposed for a first conviction for which the Criminal Court was not so harsh. He was fined Rs 1500 whereas the penalty for such offence is a maximum fine of Rs 50,000 and two years' imprisonment. The Tribunal has said in its previous Determination that dismissal was too harsh, specially that the Respondent has not been consistent in similar cases as natural justice requires. The Tribunal reiterates this principle here.

Moreover, the Appellant was fully entitled as of right to use the option of requesting his pre retirement as per the PRB report 2013 which clearly stipulates that an Officer who was born in ... may retire in In the present case the Tribunal finds no reason as to why his pre retirement from the service was not granted, but instead the Respondent has initiated action to dismiss him. The Respondent's Representative stated that had the request for leave been sent to the Respondent, as it should have been, it may had been considered.

With regards to the Disciplinary Hearing, the representative of the Respondent confirmed that the Responsible Officer recommended a suspension of 10 days but the Respondent could not proceed with the recommendation as according to him the Employment Rights Act provides only for a maximum of 4 days

suspension. It was pointed out to the representative of the Respondent that the Employment Rights Act does not apply to public officers and local government officers except for certain specific provisions. In any case the LGSC Regulation 41 provides for eight punishments amongst which the Respondent could have chosen a mere reprimand or a suspension from work without pay for a period of not less than one day and not more than fourteen days (Regulation 41(g) or (e) respectively).

The Tribunal found that the four reasons described by Respondent's Representative as to why the Commission chose the harshest punishment are far too subjective. The more so as someone who loses his job and his rights at this advanced age will certainly become a burden for his family and for society whereas he obviously had no negative impact in his workplace for 35 years.

For the reasons set out above, the Tribunal is of the view that this case should have been treated in a compassionate way and that the Appellant has been deprived of his right to get a lump sum and a pension which every worker legitimately expects to receive after long and loyal services to their respective employer. Further the inordinate delay to deal with the case victimised Appellant who was already disabled because of an injury at work.

The Tribunal therefore quashes the decision of the Respondent and remits the matter back to the Respondent under section 8(4) (b) of the Public Bodies Appeal Tribunal Act 2008.